PECD Bhd & Anor v AmTrustee Bhd and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)-385 OF 2009, W-02(IM)-386 OF 2009 AND W-02(IM)-387 OF 2009

ZALEHA ZAHARI, KN SEGARA JJCA AND KANG HWEE GEE J

15 SEPTEMBER 2009

Companies and Corporations — Arrangement, scheme of — Arrangement between company and creditors — Ex parte application to court for leave to convene creditors' meeting and restraining order — Application dismissed by High Court but allowed by Court of Appeal — Application for extension time on restraining order disallowed — Second ex parte application for leave to convene creditors' meeting and restraining order — Ex parte order granted — Application by creditors to set aside ex parte order allowed — Appeal against setting aside — Disclosure of all material facts — Whether appellants failed to disclose all material facts when applying for second ex parte order — Whether proposed scheme of arrangement lacked bona fide and against public policy — Whether monies raised by appellants out of rights issue held by appellant on trust — Companies Act 1965 s 176(1) & (10)

PECD Jaya Holdings Sdn Bhd ('PECD Jaya'), a wholly owned subsidiary of the first appellant, entered into a Murabahah Notes Issuance Facility Agreement to issue Murabahah notes ('the notes') of up to RM200m to various noteholders. AmTrustee Bhd ('AmTrustee'), was their trustee to manage the investment in the notes with all repayments of the notes to be paid to AmTrustee. When PECD Jaya, as the issuer of the notes, defaulted on the repayment of the notes, AmTrustee and the noteholders considered taking action against it. However, the first appellant, as the holding company of PECD Jaya, stepped in to obtain indulgence from AmTrustee for the issuer's default. In consideration thereof the first appellant agreed to pay AmTrustee RM30m in part payment from the first appellant's rights issue exercise. The first appellant accordingly issued AmTrustee a letter of undertaking to pay it a sum of RM30m to be received by the first appellant from its rights issue exercise with such payment to be paid not later than seven days after the date of receipt of the proceeds. The first appellant's rights issue was approved by the Securities Commission pursuant to s 32(5) of the Securities Industries Act 1993. However, upon successful completion of the rights issue exercise, both the appellants found themselves in dire financial straits and the first appellant decided to renege on its undertaking to pay AmTrustee the sum of RM30m on the grounds that it was insolvent. Thus after receiving the rights issue proceeds, the first appellant wrote to the Securities Commission to apply for approval to allow the rights issue proceeds

of RM30m which was initially earmarked to be paid to AmTrustee to be varied. In response, AmTrustee issued a letter of protest to the Securities Commission. At the same time AmTrustee issued a letter of demand to the first appellant whereby it demanded payment of the rights issue proceeds of RM30m as agreed in the letter of undertaking. In the meantime the appellants applied vide an originating summons ('the first OS') for leave to convene a creditors' meeting under s 176 of the Companies Act 1965 ('the Act') to consider a scheme of arrangement within 90 days from the date of the order and for an injunction restraining all legal proceedings against the appellants for 90 days from the date of the order (the restraining order). When this ex parte application to the High Court was disallowed the appellants appealed to the Court of Appeal which granted the application in terms save that the restraining order was granted for only 60 days. Thereafter the appellants applied under the first OS for an extension of time of the first restraining order for another 30 days, which application was dismissed. The appellants' appeal against this refusal was also dismissed by the Court of Appeal. Notwithstanding that the application had expired and the application for an extension of time had been disallowed, the appellants again applied vide an ex parte originating summons ('the second OS') for the same orders as in the first OS, ie for leave to convene a meeting to consider the scheme of arrangement and for a restraining order. When the appellants obtained an ex parte order under the second OS, Merino-ODD Sdn Bhd, Affin Bank Bhd and AmTrustee ('the three respondents') as the appellant's creditors, applied for and obtained leave to intervene and set aside the said ex parte order. In the three applications, which were heard together, the three respondents contended that the appellants in moving the second OS had not disclosed material facts. The application to set aside the ex parte order was allowed by the High Court on the grounds that there was a non-disclosure of material facts in that the appellants had failed to disclose what transpired in the first OS and the decision of the Court of Appeal in respect of the appeal therefrom when applying for the ex parte order in the second OS; and because the proposed scheme of arrangement lacked bona fide and was unworkable. In fact the High Court judge ruled that the RM30m proceeds received by the first appellant from the rights issue were expressly for the purpose of paying AmTrustee and held on trust by the first appellant in favour of AmTrustee as the sole beneficiary of the same in the nature of a *Quistclose* trust. This was the appellants' appeal against that decision. In their appeal the appellants submitted that there was no material non-disclosure of facts because there was no need to disclose the facts of the first OS when making a fresh application vide the second OS and that the provisions of s 176(10A) of the Act had been duly complied with. The appellants also argued that this case did not involve the law of trust but that of contract.

Held, dismissing the appeals with costs:

(1) (per **Zaleha Zahari JCA**) The appellants' failure to state in their

supporting affidavit the fact that their application for the first OS had been dismissed and that the order was only allowed on appeal to the Court of Appeal and that an extension of time of the restraining order was disallowed were material facts which ought to be disclosed by the appellants in applying for the second OS. The first appellant should also have disclosed the fact that RM30m came from the proceeds of the rights issue raised for the specific purpose for payment to AmTrustee for partial redemption of the notes issue. The failure to make such full and frank disclosure renders the ex parte order obtained, liable to be rightly set aside and on this ground alone these appeals could be dismissed (see paras 27–28).

(2) (per **Zaleha Zahari JCA**) The High Court judge was right in ruling that RM30m was held on a *Quistclose* trust by the first appellant in favour of AmTrustee as absolute beneficiary pursuant to the letter of undertaking. AmTrustee was entitled in law to enforce the primary trust for the RM30m against the appellants. Although there are factual differences between the *Quistclose*'s case and the facts of the present case, the principle in the *Quistclose* line of cases would apply. As such the High Court judge was right in finding that a contractual promise to apply earmarked monies for a specific purpose created an equitable trust in those monies by way of trust (see paras 35, 37–38).

(3) (per **Zaleha Zahari JCA**) The first appellant was estopped from arguing it could use the monies raised through the rights issue exercise as it wishes as the first appellant had attempted but failed to secure the Securities Commission's permission for a change in the utilisation of the RM30m. The appellants had clearly failed to act bona fide in the second OS proceedings and had abused the provisions of s 176 of the Act and the court process (see paras 42–43).

(4) (per **Kang Hwee Gee J**) The appellants' contention that there may not be a need to disclose the facts surrounding the first OS as the appellants were making a fresh application vide the second OS was unacceptable. On the contrary, since the second OS application was based on the same scheme of arrangement, all the facts relating to the previous application must be disclosed so as to enable the judge to undertake an objective assessment as to whether to grant the order sought on an ex parte basis. It is a well established requirement that an affidavit supporting the ex parte application must make a full and frank disclosure and the appellants' omission to provide the necessary antecedents of the application in this case was thus an abuse of the process of the court which may necessitate the first appellant's CEO who deposed the affidavit for contempt (see paras 67 & 69).

(5) (per **Kang Hwee Gee J**) The High Court judge was right to find the scheme of arrangement proposed by the appellants to be against public

policy but he was incorrect in his finding that the RM30m belonged to AmTrustee as beneficiary of a *Quistclose* trust. Although the RM30m was raised and intended for the specific purpose of paying the noteholders, the latter were not beneficiaries of the sum under a trust, less so a *Quistclose* trust. Unlike *Quistclose* the noteholders were not the providers of the fund and their recourse would be an action against PECD Jaya or against the first appellant to enforce its undertaking to repay the notes (see paras 71–72 & 75–76).

[Bahasa Malaysia summary

PECD Jaya Holdings Sdn Bhd ('PECD Jaya'), sebuah anak syarikat yang dimiliki sepenuhnya oleh perayu pertama, telah memasuki Perjanjian Kemudahan Pengeluaran Nota Murabahah untuk mengeluarkan nota-nota murabahah ('nota-nota tersebut') sehingga RM200j kepada pelbagai pemegang-pemegang nota. Amtrustee Bhd ('AmTrustee'), adalah pemegang amanah mereka untuk menguruskan pelaburan nota-nota tersebut di mana semua bayaran balik nota-nota tersebut perlu dibayar kepada AmTrustee. Apabila PECD Jaya, sebagai pengeluar nota-nota tersebut, gagal dalam pembayaran balik nota-nota tersebut, AmTrustee dan pemegang-pemegang nota tersebut telah membuat pertimbangan untuk mengambil tindakan terhadapnya. Walau bagaimanapun, perayu pertama, sebagai syarikat pegangan PECD Jaya, telah campur tangan untuk mendapat persetujuan daripada AmTrustee kerana kegagalan pengeluar. Sebagai balasan perayu pertama telah bersetuju untuk membayar AmTrustee RM30j sebagai sebahagian daripada bayaran daripada amalan pengeluaran hak perayu pertama. Perayu pertama sewajarnya telah memberi AmTrustee sepucuk surat akujanji untuk membayarnya sejumlah RM30j yang patut diterima oleh perayu pertama daripada amalan pengeluaran haknya di mana bayaran tersebut hendaklah dibayar tidak lewat daripada tujuh hari selepas tarikh penerimaan hasil kutipan. Pengeluaran hak perayu pertama telah diluluskan oleh Suruhjaya Sekuriti menurut s 32(5) Akta Suruhanjaya Sekuriti 1993. Walau bagaimanapun, setelah amalan pengeluaran hak selesai dengan jayanya, kedua-dua perayu mendapati mereka berada dalam keadaan kewangan yang teruk dan perayu pertama telah memutuskan untuk memungkiri akujanjinya untuk membayar AmTrustee sejumlah RM30j tersebut atas alasan bahawa ia tak solven. Oleh itu selepas menerima hasil kutipan pengeluaran hak, perayu pertama telah menulis kepada Suruhanjaya Sekuriti untuk memohon kelulusan bagi membenarkan hasil kutipan pengeluaran hak sejumlah RM30j yang pada mulanya diperuntukkan untuk dibayar kepada AmTrustee diubah. Sebagai jawapan, AmTrustee telah mengeluarkan surat tuntutan kepada perayu pertama di mana ia menuntut bayaran hasil kutipan pengeluaran hak sejumlah RM30j tersebut sebagaimana yang dipersetujui dalam surat akujanji. Sementara itu perayu-perayu telah memohon melalui saman pemula ('SP pertama') untuk kebenaran mengadakan mesyuarat pemiutang di bawah s 176 Akta Syarikat

A 1965 ('Akta tersebut') untuk menimbangkan satu skim penyusunan dalam tempoh 90 hari dari tarikh perintah itu dan untuk satu injunksi menyekat semua prosiding undang-undang terhadap perayu-perayu selama 90 hari dari tarikh perintah tersebut ('perintah sekatan'). Apabila permohonan ex parte kepada Mahkamah Tinggi ini tidak dibenarkan perayu-perayu telah merayu
B ke Mahkamah Rayuan yang membenarkan permohonan seperti dipohon kecuali bahawa perintah sekatan itu dibenarkan hanya untuk 60 hari. Selepas itu perayu-perayu telah memohon di bawah SP pertama untuk lanjutan masa 30 hari lagi untuk perintah sekatan pertama itu yang mana permohonan itu telah ditolak. Rayuan perayu-perayu terhadap keengganan ini juga telah
C ditolak oleh Mahkamah Rayuan. Meskipun permohonan itu telah luput dan permohonan untuk lanjutan masa tidak dibenarkan, perayu-perayu sekali lagi memohon melalui saman pemula ex parte ('SP kedua') untuk perintah-perintah yang sama seperti dalam SP pertama, iaitu untuk
D kebenaran mengadakan mesyuarat bagi menimbangkan skim penyusunan dan untuk perintah sekatan. Apabila perayu-perayu telah mendapat perintah ex parte di bawah SP kedua, Merino-ODD Sdn Bhd, Affin Bank Bhd dan AmTrustee ('ketiga-tiga responden') sebagai pemiutang-pemiutang perayu, telah memohon untuk dan mendapat kebenaran untuk campur tangan dan
E mengetepikan perintah ex parte. Dalam ketiga-tiga permohonan tersebut, yang telah didengar bersama, ketiga-tiga responden telah menegaskan bahawa perayu-perayu dengan pemfailan SP kedua tidak mengemukakan fakta-fakta yang material. Permohonan untuk mengetepikan perintah ex parte telah dibenarkan oleh Mahkamah Tinggi atas alasan bahawa fakta-fakta yang
F material tidak dikemukakan di mana perayu-perayu telah gagal untuk menunjukkan apa yang berlaku dalam SP pertama dan keputusan Mahkamah Rayuan berkaitan rayuan apabila pemohon perintah ex parte dalam SP kedua; dan kerana skim penyusunan yang dicadangkan itu tidak menunjukkan niat jujur dan tidak dapat dilaksanakan. Bahkan hakim
G Mahkamah Tinggi telah memutuskan bahawa hasil kutipan RM30j yang diterima oleh perayu pertama daripada pengeluaran hak tersebut adalah jelas bagi tujuan membayar AmTrustee dan dipegang atas amanah oleh perayu pertama bagi pihak AmTrustee sebagai satu-satunya benefisiari yang sama dalam bentuk amanah *Quistclose*. Ini adalah rayuan perayu-perayu terhadap
H keputusan tersebut. Dalam rayuan mereka perayu-perayu telah berhujah bahawa fakta-fakta yang material tidak dikemukakan kerana tidak ada keperluan untuk mengemukakan fakta-fakta SP pertama apabila membuat permohonan baru melalui SP kedua dan bahawa peruntukan-peruntukan s 176(10A) Akta tersebut telahpun dipatuhi. Perayu-perayu juga berhujah
I bahawa kes ini tidak melibatkan undang-undang amanah tetapi kontrak.

Diputuskan, menolak rayuan-rayuan dengan kos:

(1) (oleh **Zaleha Zahari HMR**) Kegagalan perayu-perayu untuk menyatakan dalam afidavit sokongan mereka tentang permohonan

mereka untuk SP pertama telahpun ditolak dan bahawa perintah itu hanya dibenarkan dalam rayuan ke Mahkamah Rayuan dan bahawa lanjutan masa untuk perintah sekatan yang tidak dibenarkan adalah fakta-fakta material yang patut dikemukakan oleh perayu-perayu apabila memohon untuk SP kedua. Perayu pertama juga telah mengemukakan fakta bahawa RM30j yang datang daripada hasil kutipan pengeluaran hak bagi tujuan spesifik pembayaran kepada AmTrustee untuk sebahagian daripada penebusan pengeluaran nota-nota tersebut. Kegagalan untuk membuat penzahiran yang penuh dan terbuka menjadikan perintah ex parte yang telah diperoleh, sewajarnya diketepikan dan atas alasan ini sahaja rayuan-rayuan tersebut boleh ditolak (lihat perenggan 27–28).

(2) (oleh **Zaleha Zahari HMR**) Hakim Mahkamah Tinggi adalah betul dalam memutuskan bahawa RM30j dipegang atas amanah *Quistclose* oleh perayu pertama bagi pihak AmTrustee sebagai benefisiari mutlak menurut surat akujanji. AmTrustee berhak di sisi undang-undang untuk menguatkuasakan amanah asal untuk RM30j untuk perayu-perayu. Meskipun terdapat perbezaan faktual antara kes *Quistclose* dan fakta-fakta kes ini, prinsip dalam kes-kes berkaitan *Quistclose* adalah terpakai. Oleh itu hakim Mahkamah Tinggi adalah betul dalam penemuan bahawa perjanjian kontraktual untuk menggunakan wang yang diketepikan tersebut bagi tujuan spesifik membentuk amanah ekuiti daripada wang tersebut melalui amanah (lihat perenggan 35, 37–38).

(3) (oleh **Zaleha Zahari HMR**) Perayu pertama telah diestop daripada menghujahkan ia boleh menggunakan wang yang dikutip melalui amalan pengeluaran hak seperti yang diinginkannya kerana perayu pertama telah mencuba tetapi gagal untuk memperoleh kebenaran Suruhanjaya Sekuriti untuk pertukaran dalam penggunaan RM30j itu. Perayu-perayu jelas telah gagal untuk bertindak dengan niat jujur dalam prosiding SP kedua dan telah menyalahgunakan peruntukan s 176 Akta tersebut dan proses mahkamah (lihat perenggan 42–43).

(4) (oleh **Kang Hwee Gee H**) Hujah perayu-perayu bahawa mungkin tidak ada keperluan untuk mengemukakan fakta-fakta berkaitan SP pertama kerana perayu-perayu membuat permohonan baru melalui SP kedua tidak boleh diterima. Sebaliknya, memandangkan permohonan SP kedua adalah berdasarkan skim penyusunan yang sama, semua fakta-fakta berkaitan permohonan terdahulu patut dikemukakan bagi membolehkan hakim melaksanakan penilaian objektif berhubung sama ada untuk membenarkan perintah yang dipohon atas asas ex parte. Adalah keperluan tetap bahawa afidavit sokongan permohonan ex parte patut membuat penzahiran yang penuh dan terbuka dan peninggalan perayu-perayu untuk mengemukakan keperluan permohonan dalam

kes ini dengan itu adalah penyalahgunaan proses mahkamah yang mungkin memerlukan KPE perayu pertama yang mendeposkan afidavit kerana penghinaan (lihat perenggan 67 & 69).

(5) (oleh **Kang Hwee Gee H**) Hakim Mahkamah Tinggi adalah betul apabila memutuskan skim penyusunan yang dicadangkan oleh perayu-perayu adalah bertentangan dengan polisi awam telah beliau terkhilaf dalam penemuannya bahawa RM30j tersebut adalah milik AmTrustee sebagai benefisiari kepada amanah *Quistclose*. Meskipun RM30j telah dikutip dan diniatkan bagi tujuan spesifik membayar pemegang-pemegang nota-nota tersebut, yang bukan benefisiari-benefisiari untuk jumlah di bawah amanah, dan lebih-lebih lagi bukan amanah *Quistclose*. Tidak seperti *Quistclose* pemegang-pemegang nota-nota tersebut bukan pembiaya wang dan jalan keluar mereka adalah tindakan terhadap PECD Jaya atau terhadap perayu pertama untuk menguatkuasakan akujanjinya untuk membayar balik nota-nota tersebut (lihat perenggan 71–72 & 75–76).]

Notes

For cases on arrangement, scheme of generally, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 24–42.

Cases referred to

Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567, HL (refd)

Castle Inn Sdn Bhd v Bumiputra-Commerce Bhd [2009] 1 MLJ 542, CA (refd)

King v The General Commissioners for the purposes of the Income Tax Acts for the District of Kensington, The, ex parte Princess Edmond De Polignac [1917] 1 KB 486, CA (refd)

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 316, CA (refd)

Sri Hartamas Development Sdn Bhd v MBf Finance Bhd [1990] 2 MLJ 31, HC (refd)

Legislation referred to

Capital Markets and Services Act 2007
Companies Act 1965 s 176, 176(1), (10), (10A), (10A)(c), (d)
Securities Commission Act 1993 s 32, 32(5)

Appeal from: Originating Summons D2–24–336 of 2008 (High Court, Kuala Lumpur)

Loh Siew Cheang (Kelvin Seet Wan Nam and Abdullah Abdul Rahman with him) (Cheang & Ariff) for the appellants in all the appeals.

Yoong Sin Min (Lau Kee Sern and Lee Weng Shinh with her) (Shook Lin & Bok) for the respondent in Civil Appeal No W-02(IM)-385 of 2009.

M Menon (Jaafar & Menon) for the respondent in Civil Appeal No W-02(IM)-386 of 2009.

Shanti Supramaniam (Belden) for the respondent in Civil Appeal No W-02(IM)-387 of 2009.

Zaleha Zahari JCA:

[1] The High Court judge by order dated 27 February 2009 allowed the application of the three interveners (the respondents in these appeals) to set aside an ex parte order dated 18 August 2008 obtained by the applicants (the appellants in all three appeals). The three appeals were heard jointly and were unanimously dismissed with costs. My reasons in dismissing them are as follows.

[2] The common issues for determination in these appeals are: Whether there were material non-disclosure on the part of the appellants in obtaining the ex parte order dated 18 August 2008? In respect of the appeal against the respondent in Appeal No W-02(IM)-385 of 2009, what is the consequence in law of an undertaking given by the first appellant to them as trustee of certain noteholders? Whether the proposed scheme of the appellants is mala fide?

THE FACTS

[3] The antecedent facts leading to the filing of these three appeals are these.

[4] On 14 October 2004 Murabahah Notes Issuance Facility Agreement ('MUNIF/MMTN') was executed by PECD Jaya Holdings Sdn Bhd (formerly known as Peremba Jaya Holding Sdn Bhd, 'the issuer') to issue certain notes ('the notes') of up to RM200m to various noteholders (investors). AmTrustee Bhd (the respondent in Appeal No W-02(IM)-385 of 2009 subsequently referred to as 'AmTrustee') acts as trustee for the noteholders in relation to the notes, pursuant to a trust deed dated 14 October 2004 as amended by supplemental trust deed dated 17 October 2005.

[5] In 2007, the issuer defaulted in payments under the notes which led to AmTrustee and the noteholders considering legal action to be taken. PEDC Bhd (the first appellant in all three appeals), the holding company of the issuer, requested indulgence in respect of the issuer's default. In consideration thereof, the first appellant agreed to pay to AmTrustee RM30m from the first appellant's rights issue exercise.

[6] On 1 August 2007 the first appellant issued a letter of undertaking to AmTrustee where they irrevocably and unconditionally agreed that a sum of RM30m from the proceeds received from its rights issue exercise will be paid to AmTrustee towards monies owing by the issuer under the notes and that such payment will be made not later than seven days after the date of receipt by the first appellant of the proceeds of the rights issue. The first appellant also agreed to indemnify the noteholders/AmTrustee, against all loses and claim.

[7] The Securities Commission, pursuant to the powers conferred upon them by the applicable law then, ie s 32(5) of the Securities Commission Act 1993 ('SCA'), vide letter dated 26 September 2007, approved the first appellant's rights issue exercise conditional upon the terms set out in the annexure which includes the utilisation of the rights issue monies, of which RM30m was to part-settle the MUNIF/MMTN and other borrowings that are already due and payable, as well as to comply with the relevant requirement of the Securities Commission's Policies and Guidelines on Issue/Offer of Securities pertaining to the rights issue exercise.

[8] On 18 September 2007 and 5 October 2007, the first appellant issued a circular to its shareholders on the rights issue and addendum to circular. In both these documents, it was expressly stated that, from the proceeds of the rights issue, RM30m will be for partial redemption of the MUNIF/ MMTN notes.

[9] On 10 October 2007 the first appellant's shareholders approved the rights issue exercise and subscribed to the rights issue shares. The rights issue was successfully completed, granted listing status, and quoted on Bursa Malaysia Securities Bhd on 30 November 2007.

[10] After receiving the rights issue proceeds, vide letter dated 11 January 2008, the first appellant informed AmTrustee that the subject matter of their undertaking, (ie the sum of RM30m), would not be paid to AmTrustee but would instead be utilised under a scheme which involved cash payment of RM40m to scheme creditors. In other words, instead of using RM30m out of the RM40m to settle the MUNIF/MMTN noteholders, the first appellant now intends to apply the whole RM40m to the scheme. This letter is reproduced for ease of reference. It states as follows:

> Our ref: G-FIN/AmT/RM/009–08
>
> 11 January 2006
>
> AmTrustee Berhad
>
> 17th Floor, Bangunan AmBank Group

55, Jalan Raja Chulan

50200 Kuala Lumpur

Attn:

YM Raja Amir Shah

Chief Executive Officer

Puan Nurizan Jalil

Dear Sirs,

PEREMBA JAYA HOLDINGS SDN BHD

RM200.0 MILLION MURABAHAH UNDERWRITTEN NOTES ISSUANCE FACILITY1 MURABAHAH MEDIUM TERM NOTES ('MUNIF/MMTN')

As you know, PECD Bhd is currently developing a restructuring plan for all its creditors. We hope to present a preliminary plan for the creditors' consideration in February 2008. As discussed in our meeting, the formulation of a restructuring plan for Peremba Jaya Holdings Sdn Bhd ('PJHSB') depends on the outcome of PJHSB's claims negotiations with Putrajaya Holdings Sdn Berhad ('Putrajaya Holding'). We attached herewith a letter from Putrajaya Holdings for your information indicating the proposed timeline to resolve the matter.

We would also like to note that management has deliberated at length on your proposal of transferring RM30 million of the rights issue proceeds to the MUNIF/MMTN noteholders' sinking fund. Unfortunately, management is unable to proceed with your proposal while the overall group restructuring is currently being formulated and would appeal to the noteholders to give PJHSB more time to resolve the matter.

We appreciate your understanding and we are very thankful for the patience and kind considerations which the MUNIF/MMTN noteholders have given us thus far. We will certainly hope that as the resolution on Peremba Jaya Holdings' Precinct 11 claims is imminent, you would be able to accommodate our request to discuss a plan on how to resolve the debt by February 2008.

We thank you again for your patience and kind consideration.

Thank you.

Yours faithfully,

For Peremba Jaya Holdings Sdn Bhd

Sgd

ROSMAN ABDULLAH

Group Chief Executive Officer

[11] The first appellant then, vide letter dated 22 April 2008 to the Securities Commission, applied for approval to allow the rights issue proceeds

which was initially earmarked for the partial repayment of MUNIF/MMTN amounting to RM30m, and the repayment to the Oceana lenders amounting to RM10m, resulting in an aggregate of RM40m ('earmarked proceeds'), to be varied. The rationale for the proposed scheme was, in view of the appellant's financial circumstances, the board has a duty to the general body of creditors as to the utilisation of its assets. Any payment to a specific creditor or body of creditors in preference to other creditors would amount to payments which may give rise to legal consequences. The board's proposal was that all creditors of PECD should be treated fairly, justly and equally via the proposed scheme. At that juncture, the first appellant would not be in a position to effect the utilisation of the earmarked proceeds as approved for the partial redemption of the MUNIF/MMTN noteholders and/or the Oceana lenders.

[12] AmTrustee's reaction to the non-payment for the part redemption of the MUNIF/MMTN noteholders was to issue a letter of protest dated 5 May 2008 to the Securities Commission against the first appellant's refusal to do so. AmTrustee then through their solicitors issued a letter of demand dated 8 May 2008 to the first appellant in the following terms:

> PECD Berhad
>
> 5th Floor, Block E
>
> Peremba Square, Section U2
>
> 40150 Shah Alam
>
> Selangor Darul Ehsan
>
> Attn: Encik Rosman Abdullah
>
> Group Chief Executive Director
>
> Dear Sirs,
>
> Re: Issuer : Peremba Jaya Holdings Sdn. Bhd
>
> Facilities : RM200.0 million Murabahah Underwritten Notes Issuance Facility/Murabahah Medium Term Notes ('MUNIF/MMTNs Facility')
>
> We act for AmTrustee Berhad as the Trustee for the Noteholders of the Notes issued by Peremba Jaya Holdings Sdn Bhd ('the Issuer') under the abovecaptioned MUNIF/MMTNs Facility. We also act for the said Noteholders.
>
> 2. We refer to your letter of undertaking dated August 1, 2007 ('the Undertaking') issued to our clients, AmTrustee Berhad, whereby you have irrevocably and unconditionally agreed, undertaken and guaranteed to our clients ' that a sum of RM30.0 million from the proceeds raised from the renounceable rights issue of new ordinary shares of RM0.50 each ('Rights Shares') in your company together with warrants ('Rights Issue with Warrants') — will be paid to our clients towards payment of moneys owing by the Issuer to the Noteholders under the

MUNIF/MMTNs Facility or any part thereof and that such payment will be made not later than seven (7) days after the date of receipt by you of such proceeds from the Rights Issue with Warrants. You had also agreed pursuant to the Undertaking to indemnify the Noteholders and our clients against inter alia all losses, claims, damages, costs, charges and expenses whatsoever, arising out of or in connection with any failure on your part and/or the part of the Issuer to perform any of your/its respective obligations as per the terms of the Undertaking.

3. The Rights Issue with Warrants has since been implemented with the Rights Shares having been granted listing and quotation on Bursa Malaysia Securities Berhad on November 30, 2007.

4. Notwithstanding the terms of the Undertaking and your receipt of the proceeds from the Rights Issue with Warrants, you have yet to pay the sum of RM30.0 million to our clients despite their and the Noteholders' numerous requests and reminders. This is clearly a breach of your obligations to our clients under the Undertaking. In this respect, our clients would like your URGENT written clarification as to the present status of the said RM30.0 million and whether the said sum is still being held by you.

5. Further, upon our clients' instructions and on their behalf, we hereby demand that payment of the said sum of RM30.0 million be paid by you to our clients within *seven days* from the date of this letter failing which our clients shall be compelled to commence legal proceedings against you for the recovery of the said sum forthwith without further reference to you. In all-events, all costs and expenses incurred by our clients shall be borne by you.

6. Please note that the demand herein is made without prejudice to the rights of any of our clients' rights and remedies against the Issuer in respect of recovery of sums due under the MUNIF/MMTNs Facility and under the security documents for the MUNIF/MMTNs Facility and our clients hereby reserve the right to exercise the same.

Yours faithfully,

Sgd. Shook Lin & Bok

c.c. AmTrustee Berhad

17th Floor, Bangunan AmBank Group

55 Jalan Raja Chulan

50200 Kuala Lumpur

KUALA LUMPUR HIGH COURT ORIGINATING SUMMONS NO D1–24–63 OF 2008

[13] On 5 March 2008, vide Ex parte Kuala Lumpur High Court Originating Summons No D1–24–63 of 2008 ('the first OS'), the appellants applied for leave to convene a creditors' meeting under s 176 of the Companies Act 1965 ('the Act') to consider a scheme of arrangement and for

a restraining order of 90 days. The appellants application vide the first OS was dismissed by the High Court on 24 April 2008. The appellants appealed to the Court of Appeal against the dismissal of the first OS.

[14] On 9 May 2008 the Court of Appeal allowed the appellants' appeal against the decision of the High Court dated 24 April 2008 in respect of the first OS, but however granted a restraining order only for a period 60 days expiring on 9 July 2008 ('the first RO').

[15] On 3 July 2008 the appellants' applied under the first OS for an extension of the first RO for another 30 days from 9 July 2008 which application was dismissed by the High Court on 14 July 2008. The appellants' appeal against this order of the High Court dated 14 July 2008 was dismissed by the Court of Appeal in July 2008.

[16] On 1 August 2008 the appellants' scheme of arrangement was rejected at a creditors' meeting.

KUALA LUMPUR HIGH COURT ORIGINATING SUMMONS NO D2–24–336 OF 2008

[17] The appellants then, on 13 August 2008, vide Ex parte Kuala Lumpur High Court Originating Summons No D2–24–336 of 2008 ('the second OS') pursuant to s 176 of the Act, once again applied for leave to convene meetings of certain creditors of the appellant ('the scheme creditors') to consider a scheme of arrangement dated 22 October 2008 ('the scheme') and for a restraining order of 90 days, which scheme is virtually the same as the subject matter of the first OS.

[18] On 18 August 2008 the appellants obtained an ex parte order in terms of the application under the second OS. Notices were sent out to the creditors of the scheme to convene the scheme on 14 November 2008 pursuant to the ex parte order dated 18 August 2008.

[19] Merino-ODD Sdn Bhd, (the respondent in W-02(IM)-387 of 2009, 'Merino') on 10 September 2008, Affin Bank Bhd (the respondent in W-02(IM)-386 of 2009, 'Affin') on 31 October 2008 whilst AmTrustee (the respondent in W-02(IM)-385 of 2009) on 7 November 2008, filed their respective application to intervene in the second OS. Merino and Affin applied to set aside the RO obtained in the second OS and that they be excluded from the scheme. Affin sought further order that a sum of RM7.5m be paid in an estrow account and be frozen. AmTrustee applied to set aside

the ex parte order dated 18 August 2008. On 10 November 2008, all of the respondents were given leave by the court to intervene in the proceedings under the second OS.

[20] The scheduled meeting of the creditors was called off by order of the court pending disposal of the respondents' applications to intervene. On 27 February 2009, the court allowed the respondents application and set aside the ex parte order dated 18 August 2008. Hence these three appeals.

[21] Section 176(1) of the Act provides that where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them, the court may on the application in a summary way of the company or of any creditor of the company, or in the case of a company being wound up of the liquidator, order a meeting of the creditors or class of creditors or of the members of the company or class of members to be summoned in such a manner as the court directs.

[22] Section 176(10) of the Act further provides that where no order has been made or resolution passed for the winding up of a company and any such compromise or arrangement has been proposed between the company and its creditors or any class of those creditors, the court may, in addition to any of its powers, on an application in a summary way of the company or of any member or creditor of the company restrain further proceedings in any action or proceeding against the company except by leave of the court and subject to such terms as the court imposes.

THE PROPOSED SCHEME

[23] According to the scheme the first appellant will be using the RM30m intended for the noteholders, to be paid to all creditors. Payment of a small percentage to settle each debt is proposed to be effected by cash, preference shares and ordinary shares in the first appellant. The creditors who are to vote on the scheme are placed in three categories:

(a) Scheme A — secured creditors of PCSB (second appellant)	RM2,980,630
(b) Scheme B — unsecured creditors of of PCSB (second appellant)	RM32,019,370
(c) Scheme C — unsecured creditors of PECD (first appellant)	(RM9,938,000 derived from Scheme B)
There is also a category of non-scheme creditors, outside the scheme	RM5,000,000
Total:	RM40,000,000

[24] The issues raised in argument in these appeals will now be dealt with in turn.

WHETHER THE APPELLANT HAD FAILED TO DISCLOSE MATERIAL FACTS?

[25] All of the respondents contended that the appellants, in moving the second OS, has not disclosed material facts. The learned High Court judge ruled that what transpired in the first OS, and the decision of the Court of Appeal in respect of the appeal therefrom, were material facts which should have been disclosed in their application for the ex parte order in the second OS.

[26] The appellants took the position that there was no material non-disclosure in obtaining the ex parte order dated 18 August 2008 in the second OS. The non-disclosure of their failure to obtain a further extension of the first RO from the High Court and the Court of Appeal in respect of the first OS was not material as the failure was due to non-compliance of s 176(10A)(c) and (d) of the Act upon the objection by a particular creditor when the extension was sought. In the second OS, these provisions of s 176(10A) of the Act had duly been complied with.

[27] I am in agreement with decision of the learned judge on this issue. What transpired in the first OS at the High Court, and the decision of the Court of Appeal in respect of the appeal therefrom, were certainly material facts which should have been disclosed by the appellants in applying for the ex parte order in the second OS. The first appellant should also have disclosed the fact that RM30m of the RM40m scheme monies came from the proceeds from the rights issue raised for the specific purpose for payment to AmTrustee for partial redemption of the notes, and that AmTrustee had claimed such monies. The appellants should have also held out their letter seeking Securities Commission's approval for the rights issue exercise and Securities Commission's approval for the rights issue exercise and its terms. The failure to make such full and frank disclosure renders the ex parte order obtained liable, and rightly, set aside (see *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 316 at p 328; *Castle Inn Sdn Bhd v Bumiputra-Commerce Bhd* [2009] 1 MLJ 542 at p 550).

[28] On this ground alone these appeals can and are dismissed. Notwithstanding this, the other issues raised are of some importance which must also be addressed.

WHETHER RM30M OF THE RIGHTS ISSUE PROCEEDS BY THE FIRST APPELLANT ARE TRUST MONIES

[29] AmTrustee's contention that there was a trust over the RM30m of the

rights issue proceeds because of the undertaking by the first appellant, was accepted by the High Court based on the line of cases of which *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 is the highest authority. The High Court judge ruled that the RM30m proceeds received by the first appellant from the rights issue exercise were expressly for the purpose of paying AmTrustee and held on trust by the first appellant in favour of AmTrustee as the sole or exclusive beneficiary of the same in the nature of a *Quistclose* trust.

[30] The appellants' counsel argued that this case did not involve the law of trust, but that of contract. He submitted that to constitute a trust there must be a settlor (absolute owner) extant property or at least a proprietary right to future property, a trustee (in whom legal title over the property is vested) and a beneficiary at the time of the settlor's purport to create a trust. He argued that on the date of the undertaking (1 August 2007), the first appellant only had an expectancy to future property in the total sum to be raised from the proposed increase in the share capital through the rights issue. Such an expectancy, according to the appellants' counsel, was insufficient to create a trust. In the absence of a settlor, there was no trustee in whom legal title of the subject matter of trust could be vested. In the absence of a trustee, there was no beneficiary. He submitted that in holding that there was a trust over the fund, and in finding AmTrustee as the absolute owner of the earmarked monies, the High Court judge had elevated the status of noteholders from that of an ordinary creditor pursuant to the undertaking to more than a secured creditor.

[31] According to the appellant's counsel AmTrustee was not a beneficiary, and has no locus standi to sue. In a *Quistclose* trust the money results back to the payor. In a share purchase/subscription factual matrix situation, there is generally no retention of beneficial interest or control by the purchaser/subscriber over the money paid as purchase for the shares. It is an ordinary commercial transaction between the purchaser/subscriber and the company and the purpose of a purchase/subscription is investment. Once shares have been allotted to a purchase/subscription, the money is at the free disposal of the company, the purpose having been achieved.

[32] Ms Yoong, counsel for AmTrustee, took issue. This was not a private transaction but one made known to the world at large via the circular and announcements to the public shareholders inviting subscription for the rights shares.

[33] The first appellant's letter of undertaking clearly demonstrates an unequivocal intention that the RM30m proceeds to be received from the rights issue exercise would be applied by them for part settlement for the sum

due on the notes. When the first appellant applied to the Securities Commission for approval of the rights issue exercise, it had also specifically stated that RM30m of the rights issue was for the express purpose of settling part of the notes. The public was also similarly notified as evident from the circular to shareholders dated 18 July 2007 for approval (para 2.5 and also reflected in the addendum to circular dated 5 October 2007, abridged prospectus dated 30 October 2007 to the public for subscription of the rights issue shares (para 4.2). The Securities Commission conditions or approval was confirmed in the prospectus issued by the first appellant.

[34] Ms Yoong submitted that in these circumstances the RM30m never formed part of the assets of the first appellant. If the money is used by the first appellant for its scheme to pay other creditors, this would amount to a breach of trust. The fact that the subscribers (or source of the rights issue proceeds) did not retain any equitable or beneficial interest in the RM30m does not detract from the fact that the first appellant received the money for the specific purpose of part settlement of the sum due on the notes and is therefore duty bound to apply it for that purpose.

[35] The judge was accordingly right in ruling that RM30m out of the RM40m which the first appellant proposed to distribute to the scheme creditors, is held on a *Quistclose* trust by the first appellant in favour of AmTrustee as absolute beneficiary pursuant to the letter of undertaking dated 1 August 2007. AmTrustee was entitled in law to enforce the primary trust for the RM30m against the appellants.

[36] My decision on this issue is this. In *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 at p 580 the House of Lords held that an arrangement between a payor and a payee pursuant to which the payor parts with the money to the payee with common intention that the money when received by the payee will only be applied for a specific purpose and no other purpose. In *Quistclose*, the money that was lent to the company and paid into a segregated account of the company with the bank was lent to be utilised by the company for a particular purpose, pay declared dividends to shareholders. When the purpose could no be fulfilled because of the company's intervening insolvency, the money resulted back to the lender under a resulting trust. As such, the bank could not utilise the money in the segregated account as if was the money of the company for the purpose of setting off sums owed by the company to the bank.

[37] After careful consideration of the authorities on this issue I am of the considered opinion that it is not appropriate to analyse the *Quistclose* type of case in terms of the constituent parts of a conventional settlement as submitted by the appellants' counsel. It is of course true that there are factual

differences in the *Quistclose* case, and the facts of the present case. The transaction in *Quistclose* was one of loan with no contractual obligation on the part of the lender to make payment prior to the agreement to the loan. In the present case, there is no loan but there is an antecedent debt owed by the issuer, as well as an undertaking by the first appellant, to pay to AmTrustee part of the sums owing to the noteholders from monies raised from the rights issue exercise.

[38] In my judgment the principle in the *Quistclose* line of cases is that equity fastens on the conscience of the person who receives monies for a specific purpose, and not for the recipient's own purposes, so that such a person will not be permitted to treat the property as his own or to use it for other than for the stated purpose. I am of the view that the High Court judge was right in finding that a contractual promise to apply earmarked monies for a specific purpose create an equitable trust in those monies by way of trust based on the proposition that it is unconscionable for a man to give an undertaking and obtain money on terms as to its application and then to totally disregard the terms on which the monies were to be applied. The High Court judge was therefore right in finding that the sum of RM30m out of the rights issue was held by the first appellant on a trust.

[39] This scheme, similar to that of the first which is the subject matter of the first OS, was voted out by creditors. The appellants have no funds other than the rights issue monies. It is against public policy to approve a scheme by an insolvent company (see *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1990] 2 MLJ 31 at p 35).

THE CAPITAL MARKETS AND SERVICES ACT 2007

[40] The issue raised by the appellant was that the High Court judge was wrong in applying the Capital Markets and Services Act 2007 ('CMSA') to this case.

[41] The High Court judge's held:

> The RM30m was raised from the shareholders of a public listed company pursuant to legislation, namely the Capital Markets and Services Act 2007 (CMSA).
>
> ...
>
> In my view, there is merit in the arguments of learned counsel for the third intervener that if the first applicant were to utilise the RM30m contrary to the object for which the same was raised, the first applicant would have misled and misrepresented the intention of its funds raising exercise to its shareholders, the public and the SC concerning the rights issue exercise. When looked in this way, one can see that any utilisation of RM30m contrary to the purpose for which the

same was raised would contravene the provisions of the CMSA, which might attract penal sanction. It is an offence under the CMSA if the terms and conditions of the SC for rights issue are not met. It is also an offence if false or misleading statements are made to the SC. In addition, the CMSA also provides that it is an offence if abridged prospectus for rights issue contains misleading information. No judgment of this court will be intended to aid any contravention of law. This court will not compromise on shareholder protection and market integrity. This is required and vital in order to instill confidence among investors of the integrity of our capital market and the economic sector of our country.

[42] I am of the view that nothing turns on this point for the following reasons. The CMSA came into force two days after the Securities Commission approved the first appellant's application for right issue exercise (26 September 2007). The rights issue exercise was implemented after the CMSA came into force on 28 September 2007. The relevant provisions of CMSA and its predecessor, the SIA, governing the issues of securities by a public listed company, are identical. The first appellant in any event estopped from arguing it can use the monies as it wishes as the first appellant had attempted but failed to secure the Securities Commission's permission for a change in the utilisation of the RM30m.

[43] The appellants clearly have failed to act bona fide in the second OS proceedings and had abused the provisions of s 176 of the Act and the court process. By obtaining the second RO on an ex parte basis, the appellants had restrained AmTrustee from pursuing its rights under the first appellant's undertaking. If the appellants had then proceeded to the creditors' meeting to vote on this scheme, there was a possibility the other creditors may out vote AmTrustee, as they will be paid from the monies solely due to AmTrustee.

[44] For these reasons the appeals are dismissed with costs. The deposit to the respective respondent to account of taxed costs.

Kang Hwee Gee J:

[45] This was an appeal by the appellants against the decision of the High Court in allowing the application of the interveners to set aside the ex parte order which the appellants obtained earlier under s 176 of the Companies Act 1965.

[46] The first appellant PECD was the holding company of the second appellant its wholly owned subsidiary. A

THE BACKGROUND

[47] On 14 October 2004 a wholly owned subsidiary of the first appellant, PECD Jaya Holdings Sdn Bhd had executed a Murabahah Notes Issuance Facility Agreement with some 14 investors to issue certain Islamic notes up to the value of RM200m. The third respondent (Suit No W-02(IM)-385 of 2009) was their trustee to manage their investment in the Murabahah notes and to whom all repayments of the notes were to be paid to. B C

[48] By 2007 however PECD Jaya Holdings Sdn Bhd had defaulted on the repayment of the notes. The first appellant as the holding company had to step in to obtain indulgence from the third respondent in consideration of which it undertook to pay the third respondent the sum of RM30m in part payment. The money was to be raised by a rights issue of about RM172,500,000 of the first appellant's new shares and RM81,045,600 of its warrants of which the sum of RM30m would be used to pay to the third respondent. A letter of undertaking to this effect was accordingly issued to the third respondent. D E

[49] In December 2007 after successfully completing the rights issue exercise, both the appellants found themselves in dire financial straits. The first appellant had to renege on its undertaking to pay the third respondent the sum of RM30m on the ground that it was insolvent. F

[50] On 5 March 2008 the first and second appellants made a joint ex parte application for:

(a) an order pursuant to s 176(1) of the Companies Act 1965 to convene meetings of the schemed creditors of the appellants within 90 days from the date of the order; and G

(b) an injunction pursuant to s 176(10) of the Companies Act 1965 restraining all legal proceedings against the appellants for a period of 90 days from the date of the order. H

[51] The ex parte application was disallowed by the High Court. However on appeal, the Court of Appeal granted the application in terms save that the restraining order was granted only for 60 days. I

[52] On 14 July 2008 the appellants applied for an extension of the restraining order for another 30 days but this was rejected by the High Court and also by the Court of Appeal on appeal.

[53] On 13 August 2008 the appellants again applied ex parte for the same orders notwithstanding that the application of 5 March 2008 had expired and its extension had been disallowed by the High Court and the Court of Appeal.

[54] The application of 13 August 2008 was heard by a different judge of the same court who granted the ex parte order.

[55] The first, second and third respondents who were creditors of the appellants intervened to set aside the ex parte order.

[56] The three applications were heard together at the end of which the High Court set aside the ex parte order obtained by the appellants on 13 August 2008. Hence the present appeal.

THE PROPOSED SCHEME OF ARRANGEMENT

[57] The scheme of arrangement sought to settle the appellants' combined debt of about RM1,302,514,659 and would involve a corporate restructure of the appellants by reduction of capital and consolidation of their shares. The mechanics of the scheme of arrangement was set out in detail in the supporting affidavit of the first appellant's chief executive officer, Rosman bin Abdullah.

[58] Under the scheme creditors would be required to waive 70.04% of their debt and all overdue interests or penalty charges, and to forgive all corporate guarantees given by the first appellant in respect of the indebtedness of the second appellant.

[59] A sum of RM44,938,000 would be mobilised to pay the creditors who would receive 3.45% in cash; 4.63% by the issuance of new ordinary shares of the first appellant at the conversion rate of two new ordinary shares at the par value of RM0.50 for every RM1 debt outstanding; and 21.89% by the issuance of redeemable cumulative convertible preference shares ('RCCPS') of the first appellant with a nominal value of RM1.

[60] Proceeds from the claims of the second appellant's overseas project (which would be saved in an account to be opened) would be used for the redemption of the RCCPS where necessary and required.

THE GROUNDS FOR ALLOWING THE EX PARTE ORDER TO BE SET ASIDE

[61] The application to set aside was allowed by the High Court on two broad grounds.

[62] First, His Lordship found that there was a non-disclosure of material fact in that the appellants had failed to disclose that they had previously made a similar application which had been dismissed by the High Court.

[63] Second, His Lordship found the proposed scheme of arrangement lacking bona fide and unworkable. His Lordship found as a fact that there was no 'fresh injection of capital or the entry of a so called 'white knight' to facilitate the survival of the applicants'. The sum of about RM40m which the appellants intended to inject into the scheme had come almost entirely from the proceed of the rights issue and out of this, RM30m was under the terms of the rights issue to be used to partially pay the third respondent for the benefit of the Murabahah noteholders. The court went so far as to find that this sum had belonged to the noteholders under a trust. His Lordship found the appellants hopelessly insolvent that public policy would not allow such a scheme should be sanctioned.

THE APPEAL

[64] The three appeals were filed individually by the first, second and third respondents. As the grounds of appeal are essentially similar, the appeals were heard together. At the hearing of the appeal only counsel for the third respondent submitted as counsel for the other respondents chose to adopt her submission.

[65] A number of grounds were canvassed in the appeal. Having heard the submission of the parties we were unanimous that the appeal be disallowed on the same grounds as found by the High Court. We intimated that we would provide our reasons later which we now do.

MATERIAL NON-DISCLOSURE

[66] On my part, it is clear to me that the appellants had omitted to state in their supporting affidavits the fact that a previous application under s 176 of the same nature based on the same facts, grounds and report had been made to the same court before the previous judge and had been dismissed; that the order was only allowed on appeal to the Court of Appeal which granted a restraining order of 60 days; that subsequently an application for extension of the restraining order was disallowed by the High Court and this was confirmed on appeal to the Court of Appeal; and that the proposed scheme of arrangement under the order had earlier been rejected by the creditors at the meeting on 1 August 2008.

[67] The requirement that an affidavit supporting an ex parte application for a relief must make a full and frank disclosure in order to enable the court

to properly decide whether there are grounds to grant the order on an ex parte basis is so well established. The passage from the judgment of Warrington CJ in *The King v The General Commissioners for the purposes of the Income Tax Acts for the District of Kensington, ex parte Princess Edmond De Polignac* [1917] 1 KB 486 at p 509, cited by the learned judge correctly states the law.

[68] An application made:

> in the absence of the person who will be affected by that which the court is asked to do, is under an obligation to the court the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may already obtained by reason of the order which has thus been obtained by him.

[69] The appellants' contention that there may not be a need to disclose the aforementioned facts as the appellants were making a fresh application is unacceptable. On the contrary the fact that it was a new application based on the same scheme of arrangement makes it all the more necessary that all facts relating to the previous application be disclosed for whatever reason it may have been dismissed. Without disclosing the antecedent of the new application the judge would not be able to undertake an objective assessment whether to grant the order sought on an ex parte basis. I would go so far as to say that the appellants' omission to provide the necessary antecedents of the application in this case is an abuse of the process of the court which may necessitate citing the first appellant's chief executive officer who deposed the affidavit supporting the application for contempt.

NON-BONA FIDE OF THE SCHEME

[70] It is common ground that out of the RM40m that the appellants proposed to use in the scheme of arrangement with the creditors, RM30m constituted sums from the rights issue which was raised by the first appellant specifically for the purpose of repaying the Murabahah noteholders as approved by the Securities Commission and as declared in the abridged prospectus disseminated to its shareholders.

[71] His Lordship was therefore right to find that it would be against public policy to sanction the scheme of arrangement for to do so would tantamount to condoning as against the third respondent, a breach of undertaking, and as against the subscribers who expect the proceeds would be used to pay the noteholders, a probable breach of trust and a breach of s 32 of the Securities Commission Act 1993 (then in force) respecting the non-compliance of the terms of the rights issue as approved by the Securities

Commission. I would therefore agree entirely with him that there was really nothing in the scheme that the appellants intended to propose to the creditors.

[72] Be that as it may, I am unable to agree with his finding that the RM30m belonged to the third respondent as beneficiary of a trust as submitted by its counsel Miss Yoong.

[73] A trust is derived from the House of Lords' case of *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567. Basically, a *Quistclose* trust exists when a debtor undertakes to use the loan he obtains from a lender for a purpose (in the case of *Quistclose*, for the payment of dividend). The loan obtained is then kept apart in a trust account from the borrower's other assets. In the event that the purpose of the loan cannot be achieved by reason of the debtor's insolvency, the sum in the trust account is to be returned to the lender and not to be distributed among his other creditors.

[74] In the *Quistclose*'s case a company called Rolls Razor had to borrow funds from to pay dividend which it had declared to its shareholders. It was a term of the loan agreement between Quistclose and Rolls Razor that the money would be used specifically for payment of the dividend and was to be paid to a trust account at Barclays Bank. Rolls Razor went into liquidation before the dividend could be paid out. Barclays' claim to the money in the trust account as set off against debts owed by Rolls Razor to Barclays was rejected by the House of Lords basically on the rational (per Lord Wilberforce) that 'when the money is advanced, the lender acquires an equitable right to see that it is applied for the primary designated purpose' and in that case it was for the purpose of paying dividend to shareholders.

[75] It is true the sum was raised by the first appellant from subscribers of the rights issue and was intended to be used for the specific purpose of paying the noteholders. But it is clear that the noteholders were not beneficiaries of the sum under a trust less so a *Quistclose* trust. Unlike in *Quistclose* the noteholders were not the provider of the fund. The subscribers paid the money to buy the rights issue shares from the first appellant as opposed to paying the noteholders the sum due from the first or the second appellant under the notes.

[76] The noteholders' recourse is an action against PECD Jaya Holdings Sdn Bhd (the issuer of the notes) or against the first appellant (the holding company of PECD Jaya Holdings Sdn Bhd) to enforce its undertaking to repay the notes. The noteholders stand in the same position as any unsecured creditors in respect of the debt owed on the notes in the event that the first appellant is wound up before it settles the notes.

A The appeal is dismissed with costs.

Appeals dismissed with costs.

B Reported by Kohila Nesan

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